IN THE

Supreme Court of the United States

October Term, 1955.

No. 621.

MARTHA C. REED,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

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MISCELLANEOUS.

PETITIONER'S REPLY BRIEF.

This brief is submitted in reply to respondent's Brief in opposition to petitioner's Brief on Merits.

ARGUMENT.

Point I.

Respondent's "Question Presented" Again Fails to Formulate the Issue at Bar.

We contended in certiorari proceedings and we continue to urge that the question at bar is one which turns on whether any part of petitioner's duties, in the language of the 1939 Amendment to the Federal Employers' Liability Act [1] involved:

> ". . . the furtherance of interestate . . . commerce . . ., or . . . in any way directly or closely and substantially, affect such commerce . . ."

The respondent persists in framing the question presented to the Court in terms that simply do not comprehend the realities of the job in question. Its "Question Presented" characterizes petitioner as a "file clerk" and frames her job in terms of the sole duty of ". . . carry[ing] tracings of railroad equipment between file cabinets and a blueprinting room on the same floor of the employer's office building!" [2]

We submit that the question as presented by the respondent is unanswerable because it does not comprehend the true functional nature of petitioner's job as we urged in our Brief on the Merits.[3]

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1. Act of August 11, 1939 c. 685, 53 Stat. 1404, 45 U. S. C. § 51.
2. Respondent's Brief, "Question Presented".
3. Petitioner's Brief, "Point II", p. 19 *et seq.*

Unless and until that true functional nature is analyzed, any attempt to apply the 1939 Amendment is an exercise upon the irrelevant material of status and job importance.

This is a position we have consistently maintained and we reiterate it here. Once more we have diligently searched respondent's argument in its Brief and have failed to find so much as one allusion to the actualities of petitioner's job. Rather than meet the facts at bar by discussing them in the context of the straightforward language of the 1939 Amendment, respondent has instead presented a rampant conceptualistic theory of the Amendment which, if accepted, will fasten upon the bench and bar the aimless obligation of henceforward searching for unreal categories in which to pigeonhole the real facts of every future FELA action.

The language of the 1939 Amendment will literally become irrelevant in testing for coverage under the Amendment. The sole question will be: does the label pinned on the job of a plaintiff in an FELA action conform to any of the job labels which respondent claims are an exhaustive catalogue of covered employees? If it does not, the Act will not apply notwithstanding the fact that the functional details of that job will establish any or all of the relationships to interstate commerce which, until now, have been held to be the prerequisite of coverage under that statute.

Substance will be put aside for form and FELA actions will become contests over job titles. Today the slogan "file clerk" is being used to take from a railroad employee the remedies of the FELA to which, as we have argued, she is entitled. Tomorrow the incantation of another catchword will further deplete this legislation of its vitality. Henceforward, a court faced with a contest over jurisdiction of the subject matter in a suit under the 1939 Amendment would perform its adjudicating function by mechanical classification without reference to the language of that Amendment or functional realities. Its task would be complete when it had decided whether or not any *job title* fitted those employee types which, we are told, are exhaustive.

On the basis of the argument posed by the respondent, such a task could be performed with absolutely no reference to functional details of the employee's job.

Respondent leaves no doubt that this is the theory it would have the Court accept for at the very outset of its Brief it raises the false cry of the "type of employee"[4] involved in the suit and muffles the real problem of whether ". . . any part of [that employee's] duties . . . shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially, affect such commerce . . ."

Point II.

Respondent's Statement of Petitioner's Position With Respect to Coverage Under the 1939 Amendment Is a Gross Distortion.

At this late date there is no excuse for any misunderstanding of our position, which is a matter of record and repeatedly so. Twice now respondent has attempted to put before the Court a statement of our argument which bears no resemblance to that which was made. In Certiorari proceedings respondent stated in its Brief:[5]

> "Petitioner contends . . . that following the 1939 Amendment the remedy became available to any employee regardless of the nature of his work, provided only that his duties have *some eventual* effect on the interstate business of the carrier." (Emphasis supplied.)

We dealt with this distortion in our Reply Brief on that occasion.[6]

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4. Respondent's Brief, "Summary of Argument", p. 4; "Argument", p. 7.

5. Respondent's Brief In Opposition To Petition For Writ Of Certiorari, p. 4.

6. Petitioner's Reply Brief, pp. 3-5.

For what we assume are the obvious reasons, respondent has now apparently abandoned any attempt to raise this straw-man again. It has, instead, and for the first time in the history of the case, posed the full-blown contention that we claim coverage by the FELA of *all* railroad employees. This is nothing less than contrived deception. It is repeated far too frequently in respondent's Brief to be treated as a casual error or an unimportant inaccuracy. We have set out in the margin the lengths to which respondent has gone to drive this distorting wedge into the case.[7]

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7. The following references indicate those occasions in respondent's Brief when it has either attempted to fix this false position upon us or has argued against that false position by creating it in a context where it never existed. All emphases are supplied.

p. 5: "Its purpose was not to bring *all* railroad employees within the scope of the federal legislation. . . ." We have never made any such claim.

p. 5: "The proof of the fact that the 1939 Amendment was intended to enlarge the scope of the Act only to a limited extent rather than to embrace *all* railroad employees and supplant the state remedies. . . ."

p. 6: ". . . and not with a general broadening of the Act which would bring *all* employees within its coverage."

p. 6: ". . . Congress would have used broader language had it intended to bring *all* railroad employees within the Act."

p. 6: ". . . the Act was not intended to make the FELA the *exclusive remedy* for *all* injured railroad employees . . ."

p. 8: "The petitioner claims that the 1939 Amendment brings within the scope of its provisions *virtually all* employees of a railroad engaged in interstate commerce and Chief Judge Biggs, in his dissenting opinion, apparently accepted that view." This temporary deviation from the universal belongs in the present catalogue of distortions because although momentarily abandoning an attempt to allege that we claim blanket coverage, the respondent has paraphrased Judge Biggs' dissenting opinion in terms of a virtual blanketing when in fact he said in quoting *Scarborough v. Pennsylvania R. Co.*, 154 Pa. Super. 129, 132, 35 A. 2d 603, 605. ". . . Most railroad employees come within its scope", *Reed v. Pennsylvania Railroad Company*, 227 F. 2d 810, 814 (C. A. 3, 1955). We have said nothing

Point III.

It Is Now Certain That Respondent Is Urging a Test Based on Physical Proximity, and It Is Equally Certain That Such a Test Is Untenable.

We proposed in our Brief [8] that the claim "interstate commerce" means "interstate transportation" is really symboljsm for an underlying truncated theory of the 1939

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more than this. In the context of respondent's Brief, it is obviously more appropriate to speak of "virtually all" than "most".

p. 13: ". . . Congress, when it enacted the Act of 1908, had no intention of including *all* employees within its provisions." Since respondent is urging that the 1939 Amendment covered the same "classes" as the 1908 legislation *a fortiori* this quotation fit within the present catalogue.

p. 15: "Congress was not unaware of the social undesirability of requiring *all* railroad employees to prove negligence in order to recover and face the uncertainty, delay and expense of a jury trial."

p. 21: "Since the House made no suggestion at all to alter the coverage of the Act, it is vain to attribute to it an intention to *revolutionize* the coverage." "Revolutionize" is a word completely consistent with blanket coverage.

p. 24: "The reenactment of that paragraph also demonstrated the absence of any intention to bring within the coverage of the Act the great mass of railroad employees who were engaged in intrastate or local activities." We have repeatedly urged the necessity of establishing the relationship with interstate commerce that is comprehended by the 1939 Amendment before the Amendment can be operative. This quoted portion of respondent's brief thus again confirms an argument which the respondent is having with no one but itself.

p. 25: "It should be noted that the two clauses which are said by petitioner to 'open up' the Act to *all* railroad employees". . . . Compare this with the following quotation from the Petitioner's Brief on the Merits, p. 24:

> "Note, too, that under this test there can be put to rest the traditional concern of where to draw the Federal Employers' Liability Act coverage line. As indicated, *function* and not the misleading labels of job *status* or *title* should control. It can thus be seen that under this test there *are* railroad employees who would not receive Federal Employers' Liability Act coverage. An office worker, as such, (but another label) may or may not be covered. More must be known of the precise function. Petitioner here is an office

Amendment which makes physical proximity to the classical stuff of railroading the touchstone of coverage under that statute. Respondent has at last confirmed that interpretation. It states at pages 12-13 of its Brief:

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worker who, we submit, is clearly within the ambit of the Federal Employers' Liability Act."

pp. 25-26: "In addition, it precludes a rational argument that *all* employees were intended to be brought within the Act by these clauses."

pp. 26-27: "If 'furtherance' is given a meaning broad enough to embrace *every* employee of a railroad carrier, the remainder of the paragraph is redundant and without sensible meaning."

p. 30: "If, as petitioner contends, *virtually all* railroad employees were brought within the Act. . . ."

p. 30: "Why should Congress indulge in such meaningless circumlocution if, in fact, its purpose was to make the Act apply to *all* employees of an interstate carrier." The answer, of course, is that in fact its purpose was not to make the Act apply to all employees and, therefore, no meaningless circumlocution is involved.

p. 30: "In essence, petitioner contends that the Court must find in the language of the Amendment an intention on the part of Congress to reach out and embrace railroad employees who are not transportation workers including those who are solely engaged in intrastate and local activities." This is fantasy heaped upon fantasy.

p. 36: ". . . there is nothing in the [*Santa Cruz*] opinion which would warrant the inference that those words provided a magic formula which meant that their mere use would bring *all* employees within the scope of an act."

p. 36: "It dealt with that possibility not by bringing within the Act *all* railroad employees and asserting that *all* of them affected commerce, for that was not its intention."

pp. 36-37: "The purpose of the language employed was both inclusive and exclusive, and there is no room for inference that the real purpose of Congress was to bring within the coverage of the Act employees whose duties were local and intrastate and had no relationship to transportation."

p. 38: "Petitioner ignores the long series of decisions by this Court interpreting the 1908 Act, suggests that the legislative history is 'completely useless' in resolving the issue presented in the case at bar, and argues that various federal and state decisions since the Amendment support the proposition that employees engaged in intrastate or local activities are encompassed within the broadened scope of the FELA coverage." It is extremely interesting to observe that

"The opinions of this Court reflect a frank recognition of the fact that the purpose of the Act was to provide a special remedy for those railroad employees who faced the special hazards of railroading. [citation] The decisions confined recovery to those who were actually engaged in transportation or those who, generally speaking, were in close physical and practical proximity to the instrumentalities of transportation, the 'cars, engines, machinery, track, roadbed, works, boats, wharves or other equipment', which were specifically mentioned in Section 1 of the Act. Where there was physical proximity to interstate transportation or its instrumentalities, the Court found the necessary close relationship to transportation which made the work of the employee 'in practice and in legal contemplation a part of it.' [citation] . And conversely, those whose duties did not bring them into physical proximity to such transportation or its instrumentalities were said to be without the scope of the Federal Act and within the coverage of the state laws. Clerical workers, for example, whose duties confined them to the sanctuary of the upper floors of an office building, faced no haz-

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in a brief which otherwise does not want for purported documentation this statement begs for a footnote.

p. 46: "There are two decisions in this Court which clearly demonstrate that the FELA does not cover *all* railroad employees."

p. 46: "Shortly thereafter, in *Pennsylvania R. Co. v. O'Rourke*, 344 U. S. 334 (1953), there was a direct ruling that the 1939 Amendment did not have the effect of making the FELA the exclusive remedy of *all* railroad employees."

p. 50: "On the other hand, all employees whose duties are exclusively concerned with local and intrastate activities are no more to be found within the cases permitting recovery under the Act after the Amendment, than they were found within the ones decided prior to 1939."

p. 51: "Once it is clear that the Act was not intended to embrace *all* railroad employees within the scope of its coverage, the fate of petitioner's FELA claim is no longer open to doubt."

8. Petitioner's Brief, pp. 9-10.

ards peculiar to the railroad industry since their duties did not bring them into proximity with any of the instrumentalities of transportation."

Two cases are cited by it in support of its proposition that "clerical workers" ". . . were outside the coverage of the (1908) Act".[9] *Industrial Com. v. Davis*, 259 U. S. 182, 187 (1922) and *N. Y., N. H. & H. R. R. v. Bezue*, 284 U. S. 415, 419 (1932).

In neither case is that the holding. In each the Court had before it facts involving the duties of repair workers and not "the type of employee" in the instant case. This Court has never ruled either under the 1908 Act or under the 1939 Amendment on a set of facts akin to those here. If the scope of the 1908 Act were coextensive with that of the 1939 Amendment (which, of course, it was not) and if the Court had held as respondent asserts (which, of course, it did not), we trust we would not be here now.

Note further that the focus in each of the cited cases was on the question of interstate commerce, not physical proximity to hazards peculiar to the railroad industry.

Having used these cases to establish a "physical proximity" test, respondent then attempts to engraft it into the 1939 Amendment by claiming that the latter legislation had no purpose other than to abolish the "moment of injury rule", and that all else that went before remained as before. "Interstate transportation" is said to be preserved in the Amendment, notwithstanding the absence of the term from the statute, the negation of that terminology by courts, both state and federal, and responsible students of the subject[10] and the embarrassing illogicalities to which its

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9. Respondent's Brief, p. 13.

10. These considered views are not isolated nor have we had to strain to find them. They represent the overwhelmingly dominant view of the Amendment's newly enlarged scope, yet respondent remains insistent in the face of them. For instance, Dean Vernon X. Miller, whom respondent did not hesitate to cite, has made a series of germane observations in AN INTERPRETATION OF THE ACT OF 1939

alleged corollary of physical proximity to the hazards of such transportation lead.

(FELA) TO SAVE SOME REMEDIES FOR COMPENSATION CLAIMANTS, 18 Law & Contemporary Problems 241 (1953):

"The year 1939 was a milestone in the story of the Federal Act. The statute was amended [Citation], the rigid transportation test for interstate commerce was rejected, and assumption of risk was classified with contributory negligence. Interstate commerce was expanded to include more than transportation, and the scheme of the statute was extended to cover work injuries happening to anyone, any part of whose duties are in furtherance of such commerce. The old distinctions in the case-law results had seemed artificial to many lawyers [Citation]. From the story of the litigation in the years before 1939, from the discussions in the houses of Congress, and from the text of the statute as amended, one deduction seems obvious. Congress was trying to cure a bad situation. Congress was trying to rescue the Court from legalisms that were sterile. The transportation test was devised by the Court within a few years after the date of the adverse decision on the first Federal Act [Citation]. Under the commerce clause the Court had said in that first case that Congress could regulate only those injuries that were suffered by railroad men who were engaged in interstate commerce when they were hurt [Citation]. If that premise is true, the pinpoint test for transportation does have meaning. However, during the years between 1908 and 1939 the Court in other cases touching other fields had gone far to agree with Congress that regulatory powers over commerce are great enough to affect not only the carrying and selling of goods in commerce but even the steps preliminary to the production of goods for interstate commerce [Citation]. There is little if anything in the history of previous litigation, in the floor discussion, or in the text of the statute to support a deduction that Congress was trying to close a gap and to shut off all other possible remedies, unless it is found in the *Winfield* case and the silence of Congress." (Pp. 244-245).

"The scope of the statute now is so comprehensive that there are few railroad employees who are not covered by it [Citation]. If any employee does anything as a part of his daily routine pertaining to interstate commerce under the expanded definition, he can process his case under the federal statute no matter what he was doing when he was hurt." (P. 248).

"Nevertheless, in 1939 Congress did not literally confirm, or restrict, or modify the doctrine of the *Winfield* case. Nor did Congress consider the probability of concurrent programs in any area, but Congress did plan a series of changes to extend the remedial protection of the Federal Act to more railroad personnel." (P. 254).

If "physical proximity" is the determinant, would not Miss Reed be covered if she did precisely the same work in a railroad shanty on a freight yard siding, rather than in respondent's 32nd Street Building? Does not respondent's building which is in fact but a stone's throw from its main lines to Washington and the West meet the test of physical proximity, or is there some linear measure beyond which coverage cannot reach? If Miss Reed is not covered because she lacks physical proximity, certainly a "clerical worker" such as a master-train dispatcher working on Miss Reed's floor could not be covered. Yet there can be no doubt that although his "category" should exclude him and his distance from the adbed should place him beyond the sweep of the 1939 Amendment, the glaring truth is that if he is not covered the Amendment means nothing. Or does the fact that he wears a white collar mean as a matter of law that no part of his duties involve ". . . the furtherance of interstate . . . commerce . . ., or . . ., in any way directly or closely and substantially, affect such commerce. . . ."?

Point IV.

The Scope of the 1939 Amendment Cannot Be Delineated by Respondent's Theory of the Pre-1939 "Classes".

The assertions that the categories named by respondent in the 1908-1939 period were continued precisely the same in the post-1939 period and that to fall outside of such categories is to fall outside of "interstate transportation" and the 1939 Amendment smothers credulity.

First, assuming *pro arguendo* that respondent's classification of the pre-1939 "classes" [11] is exhaustive and meaningful, there is not a shred of evidence that Congress ever had any such rigid categories in mind or ever contemplated petrifying them and them alone into the 1939 Amendment.

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11. Respondent's Brief, pp. 24-30.

Second, there is not a bit of authority to document the remarkably conceptualistic reasoning by which respondent has disassembled the language of the 1939 Amendment and reconstructed it to form the same three rigid categories.

Third, such an interpretation can only be reached by torturing the accepted meanings and usages of the words in the 1939 Amendment.

Fourth, cases arising under the 1939 Amendment reflect the falsity of the categories.[12]

Finally, this theory of the "classes" assumes that American railroads have come down the years with an unchanging physical nature and unchanging "types of employees". It leaves no room for the massive industrial transformations that have taken place in America's railroad system, the consequent development of job classifications unknown at the time of the enactment of the 1908 statute, nor the creatively pragmatic approach our courts have used in dealing with such new situations.

Let us be specific in suggesting the kind of difficulties presented. Automation has entered the railroad industry. Machines which were once man-operated are becoming machine-operated. A major technological change is under way, for instance, in yard-classification systems. It involves the displacement of men from duties which are now being prosecuted by electronic techniques and devices for the sorting and routing of railroad cars. Automating machinery, unknown until the recent past, is appearing in new railroad freight yards. These devices call for the applica-

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12. See, for instance, *Masterson v. Pennsylvania R. Co.*, 182 F. 2d 793 (C. A. 3, 1950). Counsel here were of record in that case as well. The record of the case indicates that plaintiff was a coal inspector whose duties were to go to the mines where the employer bought coal and inspect the coal for quality. Plaintiff was injured in an automobile accident in which he was driving a vehicle rented by the defendant-railroad and furnished by defendant to plaintiff for his business trips. Interestingly, defendant there admitted plaintiff's engagement in interstate commerce. Compare that set of facts with the categories suggested by the respondent and with the "transportation" and "physical proximity" tests it is now proposing.

tion of job skills and functions unknown in an earlier era of cowcatchers and wood-burning engines. They will undoubtedly bear job labels in keeping with the mid-century American tongue, labels unknown in an earlier period of railroad history. The job label of a carrier employee feeding coded tape into a digital computer whose impulses will daily sort and route thousands of box cars of the nation's railroads will bear no resemblance to anything respondent has suggested are the categories within "interstate transportation". On respondent's analysis, therefore, he could not be covered even if we assume he operates the computer next to a railroad track.[13] Why? The job classification is not one re-enacted by the 1939 Amendment. The fact that reason and obvious functional realities demand a conclusion that such a job duty is quintessentially ". . . the furtherance of interstate . . . commerce . . . or . . . directly or closely and substantially, affect[s] such commerce . . ." points up the sterility of the theory.

So, too, consider the imminent entry of nuclear power into America's railroad installations. New job classifications, new job duties and functions undreamed of in the distant or recent past will arise. The results to which respondent's theories would lead when applied to these unprecedented "types of employees" would be ludicrous.

The conclusion is plain. The effectiveness of the 1939 Amendment depends on the application of practical reasoning to the functional realities of the job duties in question. This is the sum of our argument. Such reason is the only key to whether Miss Reed's job duties or those of any other employee of an interstate carrier by rail meet the requirements laid down in the Amendment. If job function leads to a conclusion that the FELA must apply, as it does here, then the Act should be applied. Reason should have so led

13. Possibly the computer would be an "instrumentality of transportation" proximity to which would obviate the employee having to do his job by a roadbed before fulfilling this alleged precondition of coverage under respondent's view of the Act.

the majority below, but it arbitrarily refused to invoke the Act. Putting reason aside for an unrewarding excursion into conceptualism, respondent never entered the area in which this problem genuinely exists. That is why its final position bears so little resemblance to that of the majority below and why it could draw its conclusion without a single reference to the facts at bar.

Point V.

Respondent's Comparison With Other Legislation Does Nothing to Elucidate the Question at Bar.

We fail to see what significance in the context of this case can be drawn from Congress's failure to occupy the entire field covered by its power under the Commerce clause. Conceding *pro arguendo* that all employees of interstate carriers might be covered by appropriate federal legislation, how does Congress's failure to so act resolve the question of whether petitioner is covered by the 1939 Amendment?

The uselessness of this portion of petitioner's argument appears in its summary of Argument at page 6 of the Brief:

> "A comparison of the Amendment with the language of earlier and contemporary legislation involving the commerce power shows that Congress would have used broader language had it intended to bring all railroad employees within the Act."

This might have some bearing on the case if there had been a question of whether or not the Act covers all railroad employees. We have never so contended, as we have repeatedly indicated. This is a representative example of respondent arguing with itself in a void.

Point VI.

The Workmen's Compensation Argument.

We flatly refuse to be drawn into any contention about the merits of workmen's compensation systems as against the remedies under the FELA or any alternative method for the redress of injuries sustained by employees of carriers by rail. The question of whether or not the remedies afforded under the FELA are adequate is not before this Court nor, in the constitutional scheme, should it be.

Respondent has crassly injected it into the case. It is diversionary and deserves to be treated as such.

Presumably we are before the Court on its summary docket because of the limited question presented by the facts at bar, and we intend to hew to the demands of that question. We cannot leave this area, however, without registering a strong objection to the note of impertinent paternalism on which respondent has closed its argument, suggesting that Miss Reed "is much better off"[14] with the remedies provided by local law than those afforded her under the FELA. It smacks of the same turn-of-the-century attitude in which this whole problem has been approached and handled by the respondent.

Point VII.

The Straub Case.

A. Respondent's Treatment of the Case.

Respondent's attempt to deal with *Straub v. Reading Company*, 220 Fed. 2d 177 (C. A. 3, 1955) has taken on an increasingly extraordinary character. In certiorari proceedings, it sought to negate a conflict between the *Straub* decision and this one below on grounds that Straub's job "brought him on occasion to the cabs of the locomotives

14. Respondent's Brief, p. 51.

[not a part of the record in the case] and he traveled from state to state." [15]

As we suggested then, the *Straub* Court said at 183:

". . . but that fact has no bearing on whether his duties furthered or substantially affected interstate commerce."

Respondent now cites *Straub*,[16] for the proposition that it does not justify coverage for petitioner nor is it inconsistent with respondent's interpretation of the 1939 Amendment. It then quotes, not the opinion of the Court of Appeals for the Third Circuit, but our brief there, in which we argued, *inter alia*, the fact of Straub's travel in four states. We abide by the ruling of the *Straub* court, *supra*, and have argued accordingly below and here. But respondent obviously refuses to do so in this closing note of desperation.

There is no alchemy by which a fact held irrelevant by a Court of Appeals can be transformed into a relevant one by quoting it from a brief submitted by a litigant to that Court of Appeals.

B. Respondent's Analysis of the Classes Covered by the 1939 Amendment Cannot Subsume the Straub Case.

We submit that respondent's analysis of the groups covered by the 1939 Amendment is verbalism. It is sufficient in that connection to observe as we have argued the remarkable intra- and inter-circuit conflicts generated by the majority's refusal to follow its own ruling in the *Straub* case. That case, the correctness of which respondent has never disputed, simply cannot be squeezed within the shrunken confines of any of the three concentric circles proposed by respondent.[17] If it can, then *a fortiori* this

15. Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 23.

16. Respondent's Brief, p. 39.

17. Respondent's Brief, p. 29.

case must, for the instant facts are much less attenuated coverage-wise than *Straub*.[18]

Straub worked on the sixth floor of the Reading Terminal Building in Philadelphia and was injured there while helping a female fellow employee remove some office forms from a high shelf above. The ladder which caused the injury was propped against some filing cabinets at the time of the accident.

If the truncated "transportation view" and respondent's theory of "physical proximity" were applied to the *Straub* facts, Straub could not conceivably be covered by the 1939 Amendment. Certainly he is not a train crewman, switchman, signalman, crossing watchman, yard employee, maintenance worker or repairman.[19] He was not "in close physical and practical proximity to the instrumentalities of transportation, the 'cars, engines, machinery, track, roadbed, works, boats, wharves, or other equipment' ".[20] He was one of a railroad's "clerical workers . . . whose duties confined [him] to the sanctuary of the upper floors of an office building, faced no hazards peculiar to the railroad industry since [his] duties did not bring [him] into proximity with any of the instrumentalities of transportation".[21] He "faced only the hazards of file cabinets and other office furniture and the floors and windows of an office building."[22]

Straub was correct. The respondent agrees that it was correct and has never argued otherwise. That set of facts, not as strong as those at bar, was properly held within the ambit of the 1939 Amendment because *job function* was the one critical aspect of the case that controlled just as it should be here.

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18. Petitioner's Brief, pp. 25-27.
19. Respondent's Brief, p. 11.
20. Respondent's Brief, p. 12.
21. Respondent's Brief, p. 13.
22. Respondent's Brief, p. 51.

Point VIII.

Respondent Has Completely Ignored, Not Only the Facts at Bar, But the Opinions of the Court of Appeals.

We have urged that the majority of the Court of Appeals committed error of such immediate and far-reaching significance that its judgment should be reversed. The error of the majority inheres in its judgment and the opinion which shaped that judgment.

That *opinion* merits the most careful consideration because unless rendered nugatory by a reversal of the judgment below, it must, for the reasons we urged, generate widespread confusion and a rash of appeals throughout our courts on the large question of the scope of the 1939 Amendment.

We have faced that opinion, analyzed it, and centered much of our argument upon it. Our argument against its error is now a matter of record, here and in certiorari proceedings, but not once in its entire argument of 51 pages has respondent as much as touched upon it, except to characterize the majority's opinion as "well-reasoned"[23] and then proceed on a course of reasoning thoroughly unrelated to that propounded by the majority.

So too the instant facts have been totally ignored in respondent's argument. This is clinching proof of the great disservice that would be done were its theory of the 1939 Amendment accepted. We contended earlier that it would make barren classifications the sole basis for administering this important statute, and we submit that the Court has before it in respondent's Brief what could be the first exhibit in a phenomenally grave development in the FELA history: the disposition of a square question of coverage under the 1939 Amendment without a single reference to the facts which raise that question.

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23. Respondent's Brief, p. 2.

Point IX.

If Not Reversed, the Decision Below Will Excise Great Numbers of Carrier Employees, Such as Petitioner from the Protection of the Act.

It is claimed that we have not documented this assertion [24] and the term "clerical employee" is raised again by respondent. We alluded to employees whose job duties meet any of those necessary relationships set out in the 1939 Amendment. Of course, no final documentation is possible for the Court has not yet ruled upon the judgment below.

We spoke in predictive terms, and we did not speak idly. We believe deeply that the opinion of the majority below, if not reversed, will shrink coverage under the Act. In the Appendix herewith, we have set out a series of cases now in litigation under the FELA. They are cases in which our learned opponents here represent the same defendant, respondent here, and we represent plaintiffs therein all of whom were employees of respondent.

They are suits in which this respondent, by its counsel, filed answers to complaints subsequent to November 17, 1955 the date of the filing of the opinion on the Court of Appeals in the present litigation. In each case the complaint alleges plaintiff's engagement in interstate commerce. In each case the answer denies that allegation.

After 1939 and prior to the filing of the opinion below, cases involving job duties such as those set out in the Appendix would rarely have evoked such an answer to this allegation. We are now witnessing the emerging results of the majority opinion, and if not cut off at their roots by a reversal of the judgment below an immense area of litigation made fallow by the 1939 Amendment is going to breed again.

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24. Respondent's Brief, p. 45, fn. 72.

CONCLUSION.

The traditional guides to statutory construction point clearly to an interpretation of the 1939 Amendment which credits that legislation with a much broader scope of coverage than prior legislation in the field. This view of the Amendment which is substantiated in case law by the great weight of state and federal decisions and by responsible students of the legislation is, however, but a setting for present purposes and not an analytical instrument for treating the question raised by the facts at bar. In that sense it is of no dispositive use. The issue must be met through the facts which generate it, and to do this unhelpful symbols, petrifying concepts of the legislative and judicial processes, and arrant legalisms which hinder the application of reason to fact must be put aside.

The facts are clear and, in truth, agreed upon by the litigants. We contend they make the 1939 Amendment operative because, and solely because, the job functions of petitioner demonstrated by those facts fall fairly within any reasonable meaning credited to the language of the 1939 Amendment, a kind of meaning which respondent calculatedly avoids in its argument. The confusion or withdrawal of those job duties, as a matter of explorable causation, unavoidably would ramify throughout respondent's interstate system immediately and directly with consequent impedence or cessation of a great tributary in the flowing system of interstate commerce. If the 1939 Amendment does not comprehend this situation, there is no satisfactory obvious or occult explanation of what that legislation could mean.

The majority of the Court below, and the respondent, have never denied the deleterious effects upon interstate commerce which would come close upon the cessation or confusion of petitioner's job duties. The majority below fell into error by acknowledging the force of these facts.

and then turning from them in an arbitrary refusal to allow them to become legally operative. The respondent falls into error in refusing even to reach that level of analysis by blindly avoiding the facts at bar.

The error in each instance is sourced in preoccupations with legally irrelevant considerations of job status, titles and the relative importance of the carrier employees to the exclusion of the only germane inquiry: job function as it relates to interstate commerce in any of these modes specified by the 1939 Amendment. The error is compounded by an unwarranted transmutation of "interstate commerce" to "interstate transportation" to "railroading" that is in reality the manipulation of a broad congressional concept of coverage into a pinched and untenable theory of FELA coverage. Respondent's proposed tests for an ill-defined "physical proximity" and an even more ill-defined "instrumentalities of transportation" only aggravate the matter.

The petitioner's job duties indubitably place her within the four corners of the 1939 Amendment. The judgment below should therefore be reversed.

Respectfully submitted,

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APPENDIX.

The following cases were all brought in the United States District Court for the Eastern District of Pennsylvania and bear that Court's Civil Action number and the date answers were received in each case.

1. *Bilka v. P. R. R.*, No. 20129: Answer received February 8, 1956.

Plaintiff was a car-repairman employed by defendant at defendant's Freight Shop No. 2 in Altoona Car Shop, Altoona, Pennsylvania, whose job was to burn welds or any pieces of metal necessary to place a side sheet and repair a box car. The answer admits plaintiff's employment by the defendant as a car-repairman at the shop aforementioned, and as its third defense, alleges that the Court has no jurisdiction over the subject matter of the case.

2. *Deanes v. P. R. R.*, No. 19810: Answer received December 5, 1955.

Plaintiff was employed by the defendant as a loader and trucker at defendant's Front and Federal Street freight station in Philadelphia, Pa. The answer admits that plaintiff was so employed. Plaintiff loaded and unloaded freight cars traveling through defendant's entire system.

3. *Berkheimer v. P. R. R.*, No. 20128: Answer received March 5, 1956.

Plaintiff was a car-repairman's helper in the employ of the defendant at its west-bound shop in Altoona, Pa. He was injured while installing a coupler on a hopper car and working on a coupling machine used in the installation of

couplers on box cars. The answer admits that plaintiff was employed by it as a car-repairman's helper and worked at the aforesaid shop. The answer alleges, as a third defense, that the court has no jurisdiction over the subject matter of the case.

4. *Alamprese v. P. R. R.*, No. 20049: Answer received February 6, 1956.

Plaintiff was employed by the defendant as a car repairman in its Altoona Freight Shop in Altoona, Pennsylvania. Plaintiff's employment in that capacity is admitted by the answer. Plaintiff's duties were to fit couplers onto freight cars and to buck rivets.

5. *Possumato v. P. R. R.*, No. 19813: Answer received December 2, 1955.

Plaintiff was employed as a stationary fireman at defendant's South Altoona Boilerhouse, and in its answer, defendant admits such employment. Plaintiff fired boilers which powered generating equipment for defendant's car shops. Defendant alleges as its third defense the Court's lack of jurisidiction over the subject matter of the case.